Australasian Investor Relations Association

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Dear John

Aspects of Market Integrity Issues Paper

The Australasian Investor Relations Association would like to thank the Corporations and Markets Advisory Committee for the opportunity to comment on aspects of the financial markets' integrity inquiry issues paper.

Introduction:

The Australasian Investor Relations Association (AIRA) was formed with the object of advancing the awareness of and best practice in investor relations in Australasia and thereby improving the relationship between listed entities and the investment community. Among other aims, it seeks to act as a united voice for the investor relations community, in areas advancing professional standards, including in best practice disclosure. AIRA's 120 corporate members represent approximately two-thirds of the market capitalization listed on ASX.

AIRA members' key responsibilities to the boards of their companies include those for market communications, and relationships with analysts and investors. Consequently sections 3 and 4 of the Issues Paper are of specific relevance to our members, and we are restricting our commentary to those areas.

AIRA therefore welcomes this Issues Paper and the opportunities it presents for the creation of appropriate clarity for companies in dealing with rumours, and in dealing with analysts and investors.

Summary

AIRA members believe in a fair market for their company's securities, and would support appropriate action to drive deliberate rumour mongering from the market.

With its members in the front line of dealing – day to day – with analysts and investors, AIRA appreciates the difficulties of balancing a proper understanding of companies' prospects among analysts and investors, with the need for simultaneous disclosure.

In both areas, AIRA believes that each situation of rumours and analyst contacts is different. Consequently no 'one size fits all' rules can be developed. AIRA has therefore developed best practice guidelines, based on many years of day to day experience, to assist in this process, and would encourage CAMAC to recognise these guidelines as industry best practice.

3. Spreading false or misleading information

A key part of what Investor Relations officers do for their companies is to seek a fair valuation for the company's shares. By definition rumours detract from that aim, in that they are not fact. Rumours are an inevitable consequence of a free market, but rumours spread deliberately should be driven from the market.

One part of the solution is in deterrence, and ensuring that regulators have the right options for prosecution is important. Equally, clarity on how companies should handle rumours is important and guidance is helpful. No two events are the same, and writing hard coded rules applicable in all situations is almost impossible. AIRA guidance on rumours is that

"Listed companies should develop a written policy for dealing with rumours and market speculation. Generally, companies are encouraged not to comment on rumours and market speculation. Companies should set out their policy with regards to working with the ASX in instances in which market or media speculation on material information has occurred."

Specific questions.

Initiating rumours (Section 3.3)

> **(*1) the implications for market integrity of rumour-mongering***
>
> AIRA agrees with CAMAC that malicious rumour-mongering with intent, is a serious concern, and action to counter it is needed. Unchecked, rumour mongering can lead to price volatility, to inefficient price formation, and ultimately undermine trust in the markets themselves. Especially at the moment, with the likely rise in companies using rights issues for their capital needs, those companies are especially vulnerable during the offer period

(2) should all or some of ss 1041E, 1041F and 1041G be civil penalty provisions as well as attracting criminal liability

Prosecutions are difficult to progress, but are effective in raising the profile of the issue. For example, the significant rise in market abuse actions brought by the UK's Financial Services Authority in the last 2 years has been noted. Many have been brought under a civil regime, not criminal, with the civil offences (see below) having a lower burden of proof.

AIRA believes that it is the fact of a prosecution, as well as the penalty, that is a significant deterrent, so would support the creation of a regime which maximises the chances of a successful prosecution.

(3) should any of the elements of any of these three provisions be amended and, if so, in what manner

See answer to question 7.

(4) should some form of compulsory recording of telephone conversations and other electronic forms of communication, such as SMS, be introduced

AIRA does not support the compulsory recording of telephone and other electronic forms of communication. If one channel of communication were subject to recording, this would have the likely effect of driving communications to those means/forms that are not recorded.

We also note the growth of dark pools of liquidity, with an estimated 20% of the markets liquidity. Many of these do not offer transparency of the potential counterparties. We would encourage CAMAC to consider how transparency of dark and light transactions could be achieved.

(5) any other steps to facilitate the detection and prosecution of rumour-mongering.

One of the challenges is in identifying the rumour in the first place. We note the growth in social media tools and expert investor sites and the "rumour mills" which exist to capture the views of a community. A number of companies use third party electronic media monitoring type services to monitor these and other similar sites for potential rumours.

(6) would there be benefit in ASIC or the ASX providing further guidance on how companies should deal with market rumours affecting their securities

We agree that guidance (rather than regulation) of how to deal with rumours would be welcome. The CAMAC Issues Paper provides an extensive list of guidance, all of which tries to identify conditions where a disclosure should be made. These include:

> "Where the media comment appears to be reporting in specific detail a material change in strategy or that a material transaction is to occur, the

> source of the comment appears referrable to those involved, and there is an apparent or likely movement in the share price or volume, ASX is likely to take the view that an announcement would be required".
>
> "Policies on responding to rumours should aim for consistency: saying 'we do not respond to market rumours' on some occasions and at other times indicating there is no substance in a rumour may send a signal to the market"
>
> "The litmus test …is the false market"
>
> "when the market moves in a way that appears to be referrable to the comment or speculation"

These extracts from guidance notes are not contradictory, but they do place different emphases on when a disclosure is required. Review of this guidance, in conjunction with AIRA's own best practice guide, would be helpful.

(7) in that context, would it be beneficial to adopt any of the principles in the FSA Market Abuse Directive Instrument

As the Committee of European Securities Regulators has identified, the implementation of the Market Abuse Directive varies across Europe, especially in so far as penalties are concerned. However the FSA implementation referenced in the Issues Paper, is comprehensive. Between Financial Services and Markets Act Sections 118 and 397, a balance of criminal and civil penalties are open to authorities, and used effectively, can make a difference.

Recipients of rumours (Section 3.5)

(8) would it be beneficial to develop best practice guidelines on how to deal with rumours received

See answer to (9) below

(9) if so, what should be the content of those guidelines, who should develop them and how should they be monitored or enforced?

We welcome the email link established by ASIC on its public website, to receive reports on false rumours heard by listed companies in the market. In many markets, listed company whistle blowing solutions also exist, but we should steer clear of a regulatory approach along the lines of Section 301 (4) of the Sarbanes Oxley Act.

4. Corporate briefings to analysts and investors and investors

A significant part of the task of a company's Investor relations Officer lies in dealing – proactively and reactively - with analysts and investors.

The relationship between a company and the analysts covering it, is complex and contacts can be extremely frequent. They range from the formal public discussions of results, to the individual discussions sometimes required to ensure the factual accuracy of any analyst's (private or published) research (eg to ensure an analyst has used the correct publicly available data released by the company in his or her model). These contacts may be simple ad hoc 5 minute telephone conversations, or structured meetings, so they do not lend themselves to increased formal regulation.

Because of the complexity of these relationships, AIRA and Finsia (formerly the Securities Institute of Australia) have developed a best practice guide *"Principles for Building Better Relations Between Listed Entities and Analysts"*. The principles in it aim to assist analysts and listed entities to manage their communications and interactions in a way that reinforces the integrity and efficiency of Australia's markets.

AIRA therefore believes that these guidelines should represent industry best practice.

AIRA notes that the Issues Paper and the Minister's letter refer to the *perception* that some analysts and investors have access to critical information. AIRA believes that the best way to correct this perception is by reaffirming the principles above, helping companies and analysts manage the complex business of dealing with analysts and investors.

Specific questions.

> ***(1) the role that analysts and investors' briefings play in Australia's financial market and the implications for market efficiency and integrity of these briefings***
>
> Sell side analysts are a vital channel of communication to the buy side fund managers for listed companies. They create insight into those companies, which helps accurate price formation in the market. This channel supports the direct briefings that companies provide to investors.
> Research and analyst insight is provided not only to institutional fund managers, but also in the form of commentary to the media and hence to retail investors.
>
> ***Public briefings***
>
> ***(2) whether there should be greater guidance on what is required to ensure that the information provided in a public briefing is effectively and expeditiously disclosed generally? For instance, should all public briefings be webcast and/or podcast and in either case should a transcript of the proceedings also be provided***
>
> As the Issues paper notes, AIRA's best practice guide recommends that listed companies should consider using conference calls and webcasts.

Our experience is that (since the 2004 research to which the paper refers) with the availability of affordable technology, a majority of listed companies do use widely accessible webcasts and conference calls which are broadcast live and then made available for replay or download as a podcast from an archive section of the investor relations section of the company's website. Many companies also publish a transcript of the proceedings following the event too.

We believe that the regulatory structure of continuous disclosure, together with best practice guidance as to how to achieve it, works well.

(3) whether there are any approaches to public briefings of analysts and investors in overseas jurisdictions that could usefully be adopted in Australia.

See above.

Private briefings

(4) whether private briefings to analysts and investors increase market efficiency beyond what may be achieved through public briefings

Private briefings of analysts and investors (commonly referred to as "one on one meetings", although more then one person from each organisation is generally present) are a vital part of ensuring accurate valuations. Each analyst and investor may have specific or unique questions linked to their own investment ideas and strategies, which themselves drive volume and stock prices. Private briefings that ensure accuracy of the data and assumptions underlying those ideas are essential if the market is not to be misled.

(5) whether particular issues arise in relation to compliance with, and the enforcement of, the insider trading and continuous disclosure provisions, and whether, or in what manner, those issues could be dealt with through further legislative or other initiatives. In this context:

> ***- should the equivalent of SEC Rule 100 Selective disclosure and insider trading be adopted***
>
> ***- should there be mandatory record-keeping requirements for some or all private briefings and, if so, of what nature***

AIRA best practice guidance highlights several measures on the conduct of meetings with analysts and investors, including attendance by more than one company representative. (These were highlighted in the UK by the disputed meeting between Sainsbury Plc and Merrill Lynch in 2004, which prompted an FSA investigation).

(6) whether there should be any restrictions on when companies can conduct private briefings, for instance by the introduction of mandatory blackout periods for non-public briefings prior to the publication of periodic financial results.

AIRA best practice guidance is that companies should consider imposing a blackout period, which is we believe observed by almost all companies.

(7) whether there are fairness or other equal access concerns with current practices regarding private briefings and, if so, how they might be dealt with. For instance:

> ***- in what, if any, circumstances, would it be appropriate and feasible to require that all or part of the content of communications in private briefings to analysts and investors be made available to investors generally, and***
> ***- if that content is to be made available, in what manner***
> ***- should the market be informed in advance of the timing of the publication of a listed company's financial results***

AIRA firmly believes that companies, analysts and investors should be able to have conversations that do not discuss price sensitive information, without the need to disclose their contents. To require public disclosure of them would reduce the usefulness of analyst and investor research and impact accurate price formation.

AIRA supports and encourages listed entities to make an announcement to the ASX and on the company's own website, the date of the release of its financial results or other material event, as well as the timing and details of a webcast and/or conference call.

AIRA does not believe it is practical or appropriate for the contents of any private briefing to be recorded or disclosed to the market. We believe this could lead to a substantial "clouding effect" in that the ASX company announcements platform would be swamped with relatively unimportant information.

(8) whether any issues of intellectual property rights would arise in any move to require that the content of communications in private briefings to analysts and investors be made available to investors generally and, if so, how they might best be dealt with.

By its nature, analysts' and investors' research is unique, and proprietary to them. Making it public would result either in those discussions ceasing altogether (with a consequent loss of accuracy and misdirection of the market) or in firms giving up providing research. We would also note that only non price sensitive information is discussed during these contacts.

(9) whether there are any approaches to private briefings of analysts and investors in overseas jurisdictions that could usefully be adopted in Australia.

The Guidance contained in the FSA List 9 published on 24th June 2005 offers useful tips.

Thank you again for the opportunity to comment on the Aspects of Market Integrity Issues Paper. We remain open to further discussions, especially in regard to how the AIRA best practice guides can be accepted as industry best practice.

Yours sincerely,

Ian Matheson
Chief Executive Officer